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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-625

WILLIAM B. CALVERT,

Petitioner,

v.

STATE ADMINISTRATIVE BOARD OF ELECTION LAWS

AND

WILLARD A. MORRIS, STATE ADMINISTRATOR OF ELECTION LAWS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The order of the Court of Appeals of Maryland establishing the districting plan here at issue is reported at *In Re Legislative Districting of the State*, 271 Md. 320, 317 A.2d 477 (1974), *cert. denied sub nom. Twilley, et al. v. Governor*

of Maryland, ___ U.S. ___, 95 S. Ct. 70 (October 25, 1974). The unreported opinions rendered by the Court of Appeals of Maryland and by the Circuit Court for Cecil County, Maryland in the proceeding below brought by Petitioner appear in the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether there is any reason why this Court should grant the Petition, having two months ago denied a petition for a writ of certiorari raising the precise issue presented here in the context of the very same redistricting plan provision?

2. Whether this case is now moot?

3. Whether the proviso of the Maryland legislative districting plan that in three multi-county districts no county shall have more than one Delegate residing in it violates the United States Constitution when that proviso constitutes only a basis of residence of Delegates, and each Delegate is elected by the vote of all voters throughout the entire district?

CONSTITUTIONAL PROVISIONS AND JUDICIAL ORDER INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States is printed at pp. 2-3 of the Petition. Sections 1 through 5 of Article III of the Maryland Constitution are printed as an Appendix to this Brief in Opposition.

The portions of the judicially ordered districting plan directly at issue here are printed at p. 3 of the Petition.

STATEMENT OF THE CASE

Under the terms of Article III, Section 1 of the Constitution of Maryland, the legislative powers of the State are vested in a bicameral legislature called the General Assembly of Maryland. The upper house, or Senate, has a membership of forty-seven and the lower house, or House of Delegates, has one hundred forty-one members. Md. Const., Art. III, Sec. 2. Section 3 of Article III provides that the State shall be divided into forty-seven legislative districts, with one Senator and three Delegates elected from each district.

The current legislative districting plan traces its origins to the original plan proposed by the Governor of Maryland pursuant to Article III, Section 5 of the Constitution of Maryland, which became law on February 24, 1973 by virtue of the General Assembly's failure to adopt any alternative plan. That plan established forty-seven legislative districts of substantially equal population, three of such districts (34, 35 and 36) consisting of all or part of more than two counties. The Governor's plan, like the plan later adopted by the Court of Appeals and currently in effect, provided that in such districts where members of the House of Delegates were to be elected at large by the voters of the entire district, no more than one delegate could reside in any one county.

Legislative District 34, both as now constituted and as originally established in the Governor's plan, consisted of all of Cecil, Kent and Queen Anne's Counties. The populations (1970 census) of these counties are 53,291, 16,146 and 18,422, respectively.[1] The geography and general characteristics of Legislative District 34 and the three counties which comprise it are described in the opinion of the Court of Appeals below. Appendix to Petition, pp. 19a-20a.

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[1] Legislative District 35 under the Governor's plan consisted of all of Caroline, Talbot and Dorchester Counties and parts of Wicomico and Somerset Counties, and as now constituted includes all of the

As a result of original proceedings instituted by various registered voters, (other than Petitioner) before the Court of Appeals of Maryland pursuant to Section 5 of Article III of the Maryland Constitution, the Court found that constitutionally adequate public hearings had not been held on the Governor's plan and invalidated it by order dated July 31, 1973. The Court then directed that hearings be conducted by its retired Chief Judge, sitting as a special master, and that all registered voters who wished to show cause why the Governor's plan should not be adopted by the Court as the districting plan for the State come forward and either testify at those hearings or formally intervene in the proceedings, or do both. Various registered voters did testify and formally intervene. These proceedings before the Court of Appeals culminated in the order of March 15, 1974, reported at *In Re Legislative Districting*, 271 Md. 320, 317 A.2d 477 (1974), establishing the districting plan which is the object of Petitioner's present attack. The Court's plan varies from the Governor's plan in a number of respects not material here.

Several registered voters of Wicomico County (split between Districts 35 and 36), who had intervened in the Court of Appeals proceedings, filed with this Court a petition for a writ of certiorari. Certiorari was unanimously denied on October 15, 1974 *sub nom. Twilley et al. v. Governor of Maryland.* One of the questions presented there, as set forth at page 2 of the *Twilley* petition, was:

> "Whether Petitioners and all other residents of Wicomico County (population 54,236) have been denied their Constitutional rights under the Federal and Maryland Constitutions by said Order [of the Court of Appeals] . . . providing that no county or part of a

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first three counties and a part of Wicomico County. Legislative District 36 under the Governor's plan consisted of all of Worcester County and parts of Wicomico and Somerset Counties. Now it includes all of Worcester and Somerset Counties and part of Wicomico County. Together, Legislative Districts 34, 35 and 36 comprise what is known as Maryland's Eastern Shore.

county, in a multi-county legislative district, may have more than one resident delegate."[2]

After the completion of these proceedings before the Court of Appeals of Maryland and the filing of the *Twilley* petition for a writ of certiorari, but before its denial, the Petitioner herein, a registered voter of Legislative District 34, a candidate for the Democratic nomination for House of Delegates from District 34, and a resident of Cecil County, instituted a separate suit in the Circuit Court for Cecil County. He had not participated in the earlier proceedings before the Court of Appeals. The suit was filed on August 9, 1974, thirty-two days before the primary election of September 10, 1974 in which Petitioner was a candidate. The principal issue presented was whether the residents of Cecil County, who outnumbered the remaining residents of Legislative District 34, would be deprived of their constitutional rights by a districting plan which only allowed the voters of the District to elect one resident of Cecil County rather than two or three.

Because of the shortness of the time before the primary election, the case was presented to and decided by both the trial court and the Court of Appeals of Maryland on an expedited basis. On August 16, 1974, the Circuit Court for Cecil County granted the relief prayed and ordered that the primary election in Legislative District 34 be conducted without regard to the residence limitation embodied in the earlier order of the Court of Appeals of Maryland. It did so primarily on the basis of its conclusion that the residence limitation violated the rights of the voters of Cecil County

[2] The question was phrased in the State's brief in opposition (p. 2) as follows: "Whether the proviso of the Maryland legislative districting plan that in districts such as District 36 no county shall have more than one delegate residing in it affects equality of representation where that proviso constitutes only a basis of residence of delegates, and is not a basis for voting or representation."

under the Fourteenth Amendment to the United States Constitution.

An immediate appeal was taken and the Court of Appeals of Maryland, after granting a joint petition for a writ of certiorari, receiving briefs and hearing argument, entered a per curiam order on August 23, 1974, reversing the judgment below and stating that the applicable portion of its earlier order of March 15, 1974 "is hereby reaffirmed as being constitutional and valid. . . ." Appendix to Petition, p. 13a. On October 10, 1974, the Court of Appeals issued an opinion setting forth the grounds for its decision. In upholding the districting plan and residence limitation on federal constitutional grounds, the Court noted that each Delegate is elected by, and must be responsive to, all of the residents of the district without regard to his or their residence, and relied on four decisions of this Court, principally, *Dusch v. Davis*, 387 U.S. 112 (1967). Appendix to Petition, pp. 21a-28a. The Court also ruled that it had exclusive original jurisdiction under the Maryland Constitution to pass on the constitutional claims and rejected the claims that the residence limitations violated the Maryland Constitution and that the primary election ballot did not conform with the requirements of Maryland statutory law. Appendix to Petition, pp. 28a-38a.

The September primary election was conducted in accordance with the per curiam order of August 23rd. In Legislative District 34, the resident of Kent County who had filed for the Democratic nomination for the House of Delegates was declared nominated and his name was omitted from the ballot in accordance with State law and the order of the Court of Appeals. In the contest for the remaining two nominations, the Petitioner received the third highest total of votes and thus failed to secure his party's nomination. The two successful nominees, one a resident of Cecil County

and the other of Queen Anne's County, were separated by only 310 votes.

The general election was conducted on November 5, 1974, and, in District 34, three candidates residing in the three different counties received the greatest number of votes and the fourth candidate, a resident of Cecil County, was defeated by a substantial margin. The successful candidates will serve a term of four years as members of the House of Delegates.

ARGUMENT

I.

THE PETITION PRESENTS EXACTLY THE SAME ISSUE WHICH THIS COURT DECLINED TO REVIEW TWO MONTHS AGO.

The precise legal issue presented here by Petitioner was also squarely presented for review only months ago, when certain registered voters of Wicomico County filed their petition for a writ of certiorari seeking a review of Maryland's court ordered districting plan as applicable to at large voting in multi-county districts. *In Re Legislative Districting*, 271 Md. 320, 317 A.2d 477, *cert. denied sub nom. Twilley, et al. v. Governor of Maryland*, ... U.S. ..... , 95 S. Ct. 70 (October 15, 1974). One of the questions presented to this Court for review in those proceedings was whether the 44,568 residents of Wicomico County included in Legislative District 36 had been denied their federal constitutional rights by virtue of the fact that two of the three Delegates to be elected from their District must be residents of the other two counties included in the District. Like the residents of Cecil County here, the 44,568 residents of Wicomico County in *Twilley* outnumbered the remaining residents of the District. The denial of certiorari in *Twilley* was clearly correct and appropriate, and the difference in the particular numbers of residents involved in Legislative District 34 and Cecil County does not justify review of the same issue presented in *Twilley*. Indeed, the

fact that the Petitioner's candidacy for the House of Delegates has now proven unsuccessful and the 1974 elections are now history suggests that if the case is not moot, there is even less reason for granting review.

II.

THIS CASE IS NOW MOOT.

Even if Petitioner could prevail on the merits, no relief could be afforded Petitioner in connection with his candidacy in the 1974 elections. Indeed, the applicable decisions of this Court indicate that even if the question had been presented here during the month prior to the September primary election, relief would not have been available. See, *e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 585 (1964), *Roman v. Sincock*, 377 U.S. 695 (1964), and *Williams v. Rhodes*, 393 U.S. 23 (1968). Petitioner has sought relief below essentially as a candidate and the only relief sought was the issuance of an injunction with respect to the 1974 elections. No declaratory relief was sought. Appendix to Petition, pp. 16a-17a. Accordingly, since the relief prayed is no longer available and the Petitioner's status as a candidate has been terminated by his defeat, the case is now moot and the petition should be dismissed for that reason. *Richardson v. McChesney*, 218 U.S. 487 (1910). The limited nature of the relief requested is significant. In *DeFunis v. Odegaard*, ... U.S. ..... , 94 S. Ct. 1704 (1974), this Court, in vacating the judgment of the lower court on grounds of mootness, pointedly noted that "DeFunis did not cast his suit as a class action, and the only remedy he requested was an injunction commanding his admission to the Law School." 94 S. Ct. at 1706.

III.

THE LOWER COURT CORRECTLY APPLIED THE CONTROLLING DECISIONS OF THIS COURT IN UPHOLDING THE RESIDENCE LIMITATION.

It should be stated at the outset that this case does not involve a situation where there is any noticeable disparity between the relative populations of representational units and the numbers of legislators representing those units. Legislative District 34 is one of three multi-county legislative districts electing three members of the House of Delegates on an at large basis. There is no suggestion or argument made here that the residents of District 34 as a whole are not accorded full representation in Maryland's General Assembly relative to the other forty-six legislative districts.

Petitioner urges that while the District as a whole is fully represented, the residents of Cecil County, who comprise a majority of the residents of the District, are invidiously discriminated against because they must be represented by one of their own residents and by two other Delegates who will necessarily reside in the other two counties included in the District. It is clear that the long line of cases in which this Court has attempted to delineate the limits of constitutionally permissible population variance among different representational units is not directly applicable. The three counties comprising Legislative District 34 do not constitute separate representational units. To view these three counties as constituting sub-districts for representational purposes simply by virtue of the fact that each county is assured that one of its residents will be elected to the House of Delegates by the voters of the entire District would require an extraordinarily parochial view of the democratic process.

As the Court of Appeals of Maryland correctly concluded, the case is essentially controlled by the decision of this Court

in *Dusch v. Davis*, 387 U.S. 112 (1967). Indeed, the Court of Appeals was so convinced of this that it overruled its earlier decision in *Secretary of State v. Bryson*, 244 Md. 418, 224 A.2d 277 (1966), which had relied upon the lower federal court decision reversed in *Dusch v. Davis*.

Dusch v. Davis involved the districting plan applicable to the election of a city council for Virginia Beach, Virginia. The council was composed of eleven members and the districting plan provided that four members were to be elected at large without regard to residence[3] and that seven members were to be elected at large, with one of these being required to reside in each of the seven boroughs. The population of the boroughs ranged from a low of 733 to a high of 29,048. Mr. Justice Douglas there said for the Court:

> "... The fact that each of the seven councilmen must be a resident of the borough from which he is elected, is not fatal. In upholding a residence requirement for the election of state senators from a multi-district county we said in Fortson v. Dorsey, 379 U.S. 433, 438, 85 S. Ct. 498, 501, 13 L. Ed. 2d 401:
>
> > "'It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides. The statute uses districts in multi-district counties merely as the basis of residence for candidates, not for voting or representation. Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator.'
>
> "By analogy the present consolidation plan uses boroughs in the city 'merely as the basis of residence for candidates, not for voting or representation.' He is

[3] Here, the Senator for Legislative District 34 is elected at large without regard to residence.

nonetheless the city's, not the borough's, councilman. In *Fortson* there was substantial equality of population in the senatorial districts, while here the population of the boroughs varies widely. If a borough's resident on the council represented in fact only the borough, residence being only a front, different conclusions might follow." 387 U.S. at 115-16.

The Court then went on to note that under *Reynolds v. Sims*, 377 U.S. 533 (1964), and succeeding cases, the Equal Protection Clause of the Fourteenth Amendment is violated in apportionment cases only when there is an *invidious* discrimination. The Court found that the population disparity among the seven boroughs of Virginia Beach did not support a finding of invidious discrimination and that there was sufficient justification for the residency provisions in the desire to assure that there would be members of the City Council with some general knowledge of the distinct problems of each of the disparate boroughs.

The decision of the Supreme Court in *Dusch* is, we submit, a compelling if not controlling precedent for upholding the constitutionality of the residence limitation applicable in Legislative District 34. Despite the residence limitation and notwithstanding that a candidate or Delegate may reside in a particular county, the fact of the matter is that all of the Delegates in the District are elected at large and represent the *entire* District and *all* of its residents. While it may be assumed that the elected Delegates will feel a greater affinity towards the needs and requirements of those residents of the county in which they reside, they are ultimately responsible to the voters of the entire District. As the Court of Appeals said below:

"To say that a delegate elected by the voters of all three counties but required for election to reside, for instance, in Kent County will be concerned only with the interest of Kent County in the General Assembly

> is to pay little heed to the realities of political life. Since he is elected by all of the voters in the district, it seems safe to say that one who sees fit to ignore a substantial portion of his constituency undoubtedly will be rebuked when he is next obliged to face the electorate." Appendix to Petition, p. 27a.

Indeed, the voters of Cecil County are assured by their very numbers that their Delegates who reside in the two smaller counties will be responsive to their needs. The composition of the District's electorate essentially forces these Delegates to secure significant support from the more numerous voters of Cecil County in order to survive politically.

The population disparities involved among the residence areas are not nearly as dramatic here as they were in *Dusch v. Davis*. The total population of Virginia Beach was 85,218 (versus 87,859 for Legislative District 34). In *Dusch* the smallest borough (Blackwater) was assured a 9% representation (one of eleven councilmen) despite the fact that it contained less than 1% of the population (744). Under Petitioner's view of the "realities" of at large voting with residence limitations, that borough received a representation nine times greater than its population justified. Yet here, the smallest county in District 34 includes 18% of the District's population and is assured of having 33⅓% of the District's Delegates residing within its borders.[4]

Just as this Court found ample justification for the at large voting residence limitation plans in *Fortson v. Dorsey*, 379 U.S. 433 (1965) and *Dusch*, the Court of Appeals of Maryland correctly found substantial legitimate justifications for the similar plan involved here. In fact, the justifica-

[4] We do not, of course, have any threat here of a substantial minority of the population being able to control a majority of a legislative body. Such a danger was present in *Dusch*, but the Court apparently felt that the four totally at large seats offered adequate protection against that.

tion for assuring that each of the three counties in District 34 has a resident member of the General Assembly of Maryland is stronger than the factors cited in *Dusch v. Davis*. Here, the residence sub-areas are counties, which in Maryland have consistently constituted the controlling building blocks for representation in the General Assembly up until the current districting plan. While Kent County possesses limited home rule powers, neither Cecil County nor Queen Anne's County has home rule. Both of these counties must therefore rely upon the enactment by the General Assembly of local legislation. See discussion in the Court of Appeals opinion below, Appendix to Petition at p. 27a. Primarily for these reasons, Article III, Section 4 of the Constitution of Maryland requires that due regard be given to the boundaries of political subdivisions in the creation of legislative districting plans.

Beginning with *Reynolds v. Sims*, 377 U.S. 533 (1964), and as recently as *Mahan v. Howell*, 410 U.S. 315 (1973), this Court has consistently recognized the legitimacy of relying upon the special needs and configurations of local political subdivisions in justifying reasonable deviations from strict population-based representation in State legislatures. As this Court said in *Mahan*:

> "We are not prepared to say that the decision of the people of Virginia to grant the General Assembly the power to enact local legislation dealing with the political subdivisions is irrational. And if that be so, the decision of the General Assembly to provide representation to subdivisions *qua* subdivisions in order to implement that constitutional power is likewise valid when measured against the Equal Protection Clause of the Fourteenth Amendment. The inquiry then becomes whether it can reasonably be said that the state policy urged by Virginia to justify the divergencies in the legislative reapportionment plan of the House is, indeed, furthered by the plan adopted by the legislature, and whether, if

so justified, the divergencies are also within tolerable limits." 410 U.S. at 325-326.

Here, in recognition of the special needs of the counties which must rely upon the General Assembly for local legislation, the districting plan does not attempt to go so far as to provide representation to the counties in District 34 *qua* counties. Rather, the plan represents a legitimate and sensible effort to both avoid representational disparity and to insure that each county will have some voice in the lower house of the General Assembly. If there were no residence limitations, Cecil County could control the three Delegates,[5] all of whom could ignore the needs of the two smaller counties and rely solely on the larger Cecil County electorate to return them to office. The residence limitation avoids this danger, assures each county that it will have a resident in the House of Delegates, and at the same time insures that all of the Delegates will be responsive to the residents of the entire District.

These special needs of the Maryland counties included in District 34 for local legislative action by the General Assembly, when taken together with the geographical considerations discussed by the Court of Appeals in its opinion, more than justify the districting plan here in question. No scheme to avoid the consequences of reapportionment or to perpetuate incumbents in office is presented here. No racial, economic, political or other discrimination is present. There can be no invidious discrimination in a plan which reflects such careful and proper consideration of the competing

[5] This identical problem was presented and commented upon in *Dusch v. Davis*. There Mr. Justice Douglas noted that the two most populous boroughs could, if they acted in concert, elect all eleven councilmen if voting were at large but there were no residence limits. 387 U.S. at 117, n. 5. Precisely the same thing can be said with respect to Legislative District 34 and the potential total control thereof by the residents of Cecil County. The present plan avoids this.

interests involved. The Court of Appeals correctly decided the case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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APPENDIX

CONSTITUTION OF MARYLAND, ARTICLE III

Section 1. Legislature to consist of two branches; to be styled General Assembly.

The Legislature shall consist of two distinct branches; a Senate, and a House of Delegates, and shall be styled the General Assembly of Maryland.

Section 2. Membership of Senate and House of Delegates.

The membership of the Senate shall consist of forty-seven (47) Senators. The membership of the House of Delegates shall consist of one hundred forty-one (141) Delegates.

Section 3. Division of State into Legislative districts; number of Senators and Delegates from each district; subdivision of districts.

The State shall be divided by law into legislative districts for the election of members of the Senate and the House of Delegates. Each legislative district shall contain one (1) Senator and three (3) Delegates. Nothing herein shall prohibit the subdivision of any one or more of the legislative districts for the purpose of electing members of the House of Delegates into three (3) single-member delegate districts or one (1) single-member delegate district and one (1) multi-member delegate district.

Section 4. Requirements for districts.

Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions.

Section 5. Legislative districting and apportionment following each decennial census.

Following each decennial census of the United States and after public hearings, the Governor shall prepare a plan setting forth the boundaries of the legislative districts for electing of the members of the Senate and the House of Delegates.

The Governor shall present the plan to the president of the Senate and Speaker of the House of Delegates who shall introduce the Governor's plan as a joint resolution to the General Assembly, not later than the first day of its regular session in the third year following the 1970 census, and in the second year following every census thereafter, and the Governor may call a special session for the presentation of his plan prior to the regular session. The plan shall conform to Sections 2, 3 and 4 of this Article. Following each decennial census the General Assembly may by joint resolution adopt a plan setting forth the boundaries of the legislative districts for the election of members of the Senate and the House of Delegates, which plan shall conform to Sections 2, 3 and 4 of this Article. If a plan has been adopted by the General Assembly by the 45th day after the opening of the regular session of the General Assembly in the third year following the 1970 census and in the second year following every census thereafter, the plan adopted by the General Assembly shall become law. If no plan has been adopted by the General Assembly for these purposes by the 45th day after the opening of the regular session of the General Assembly in the third year following the 1970 census and in the second year following every census thereafter, the Governor's plan presented to the General Assembly shall become law.

Upon petition of any registered voter, the Court of Appeals shall have original jurisdiction to review the legislative districting of the State and may grant appropriate relief, if it finds that the districting of the State is not consistent with requirements of either the Constitution of the United States of America, or the Constitution of Maryland.

Upon the adoption by the qualified voters of the State in 1972 of the above amendments to Sections 2, 3, 4 and 5 of this Article, any legislative districting and apportionment plan submitted by the Governor or adopted by the General Assembly pursuant to the provisions of this section as they existed immediately prior to the adoption in 1972 of the said amendments, shall be void and of no effect provided that any plan adopted by the General Assembly prior to the first day of the regular session of 1973 in conformity with Sections

2, 3, 4 and 5 of this Article, as amended in 1972, shall not be void, but shall become law immediately upon the adoption of the amendment. The adoption of these amendments in 1972 does not affect the election, tenure, powers, privileges, and duties of any member of the General Assembly in office when these amendments become effective, for the remainder of the term for which he was elected.